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Court, U.S.

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IN THE

Supreme Court of the United States

SANDRA KAY BATTISTA, *et al.*,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed receiver of Bank of Newport, a failed depository institution,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether when Congress said that parties to employee benefit contracts that the FDIC has lawfully repudiated — but no other parties not similarly situated — were entitled to be paid "damages" by the FDIC it intended that the FDIC could pay those damages from liquidated bank assets rather than from its own resources in cash, despite California law requiring that such employee benefits be paid in cash.

PARTIES TO THE PROCEEDING

The Petitioners not listed in the caption are: Joan Renee Taylor; Douglas Fabbri; Laurie Lou Chandler; Sherry Leysen; Karen A. Marino; Patsy D. Thompson; Bobbie J. McNeil; Mary Marsicano; Shirley A. Van Buskirk; Erika Rivero; Robert B. Faternick; Donald J. Bruyn; Annette Hanson; Julie C. Mazo; Constandeanna Elenie Wright; Glenda C. Moberg; Pamela A. Fairchild; Rebecca L. Smith; Cathy Lynn Fulton-Maloney; Harold Richard Norbrothen; Deborah Jane Tafoya; Carmen Razo; Robert Edward Steele; David S. Gordon; Linda Susan Aubin; Gilbert Fonseca; Mary Kellogg; Lisa M. Kelsey; Laura Lilly; Carole Meyers; James W. Pilgrim; Sarah E. Rodriguez; Nancy L. Shipman; Shawn Alison Shoemaker; Donna Smith; Jackie Todd; Courtney Wight; Cheryl C. Zweber; Carol Ann Okon; Lois A. Marcus; James L. Lauritzen; Valerie A. Hussey; Roberta L. Facchina; Ina Hahn; Diane Jo Allen; Tracy A. Allen; Carol Dignard; Hasmik Keyribaryan; Cathy Kiaha; George Klasser; Evodio Medina; Violette Naaman; Kimberly Jo Oliva; Hasmik Pashaie; Susan J. Rossi; Maria Del Carmen Contreras; John U. Crandall, III; Jan M. Eisenbeisz; Kyle Lance Miller.

The Respondent is the Federal Deposit Insurance Corporation, a federal agency.

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Petitioners respectfully ask this Court to issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A, 1a) is reported at *Battista v. FDIC*, 195 F.3d 1113 (9th Cir. 1999). The district court opinion (App. C, 22a), is unreported. The district court's order denying reconsideration is also unreported (App. B, 19a).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on November 2, 1999. A timely petition for rehearing was denied on January 27, 2000 (App. E, 40a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant text of 12 U.S.C. § 1821, subsections (d) and (i), is set forth at App. F. The key provision of § 1821(e) states:

> **(e) Provisions relating to contracts entered into before appointment of conservator or receiver.**
>
> * * *

(3) Claims for damages for repudiation.

(A) In general. Except as otherwise provided, the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be —

(i) limited to actual direct compensatory damages; and

(ii) determined as of —

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of the any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages. For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include —

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

STATEMENT OF THE CASE

The fundamental question in this case is whether when Congress made the FDIC liable to pay "actual direct compensatory damages" when it lawfully repudiated certain kinds of long-term contracts that certain parties had with a failed financial institution[1] it intended those damages to be paid by the FDIC in cash, as California law requires for employee benefits, or whether all that Congress meant by a right to "damages" was the right to have a "receiver's certificate" that the FDIC could require be satisfied out of the liquidated assets of the bank.

No court has ever decided what Congress meant when it said that the FDIC must pay "damages" and no federal court has ever specifically defined "damages" in any context applicable here. But courts, commentators and dictionaries all equate a right to "compensatory damages" to a right to cash money; the California Supreme Court has specifically so held. And until the decision below, no court has ever allowed a government agency to satisfy its own liability to pay compensatory damages with property belonging to others.

Although the specific question is itself is of first impression, the decision below conflicts with every relevant conclusion of the Courts of Appeals, including the Ninth Circuit's own previously expressed views, the assumptions of this Court about what damages are and do and this Court's holding on the preemptive effect of FIRREA. If allowed to

1. For clarity, while FIRREA speaks of all bank regulators and all failed financial institutions, petitioners will generally refer to the Federal Deposit Insurance Corporation ("FDIC") and "the bank" throughout this petition.

stand, the decision nullifies the remedial intent that Congress wrote into the statute by depriving petitioners of cash compensation for valuable employee benefits that Congress and California intended they should have.

A. FIRREA's Treatment of Claims

In 1989, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), in response to the nation's banking crisis. The law makes the FDIC the receiver or conservator of a failed institution for the protection of depositors and creditors and establishes a scheme for dealing with claims against the failed institution on its existing obligations. These obligations range from the ordinary consumer debts of any business to long-term contracts that survived the bank's failure.

To resolve and dispose of all of these obligations, Congress classified them into two discrete categories: certain valuable long-term contracts that the regulator is required to assume or reject under 12 U.S.C. § 1821(e) and the balance of the ordinary contracts and trade debts of the bank that are to be proven and then paid out of the collected liquidated assets of the failed bank under 12 U.S.C. § 1821(d).

Ordinary obligations owed to trade creditors are treated much as a bankruptcy court treats the debts of a debtor. The parties are required to submit proofs of their claims to the FDIC and all approved claims were entitled to participate, pro rata, in the marshaled and liquidated limited assets of the failed bank. To that end, Congress provided a comprehensive scheme, including short statutes of limitation, for the processing and satisfaction of those claims to the extent of the bank's assets.

With respect to the narrow class of contracts that the FDIC was required to assume or reject, however, after the FDIC exercised its discretion to assume and therefore perform those contracts, or to repudiate them, Congress tersely provided that those parties, including petitioners, whose contracts are repudiated are entitled to "damages", but Congress provided neither a mechanism to establish these "damages" nor a timetable beyond "a reasonable period" for the FDIC to act.

Because Congress did not provide any express mechanism for the processing by the FDIC of the claims of parties entitled to contract repudiation damages, the Courts of Appeals allowed the FDIC to use for "damages" claims the same forms it uses to process ordinary creditors' claims, based on some of the mechanisms that Congress had established for the processing of those claims. *See, e.g., Heno v. FDIC*, 20 F.3d 1204, 1207-1210 (1st Cir. 1994). But prior to the decision here no court had ever concluded that the FDIC's desire to process a claim form submitted by a party who was entitled to "damages" after repudiation converted that claimant's statutory right to "damages" from the FDIC into a mere trade creditors' claim payable from the liquidated assets of the failed bank.

B. Procedural Background

Petitioners were employees of the Bank of Newport, which was seized by the FDIC after it failed. Each petitioner had a severance and separation agreement with the bank that provided for a fixed sum upon termination calculated on the basis of that petitioner's wages and years of employment. When the bank was seized petitioners' right to payment vested. App. 30a-31a.

Each petitioner then timely filed a claim form provided by the FDIC and, as it was lawfully entitled to do, in due course the FDIC repudiated each of the severance and separation agreements. After the FDIC refused to pay, petitioners sued for the damages to which Congress said they were entitled upon repudiation of their contracts. App. 31a.

The parties stipulated that each petitioner was entitled to actual direct compensatory damages from the FDIC pursuant to § 1821(e) and *Monrad v. FDIC*, 62 F.3d 1161, 1172 (9th Cir. 1995), and consequently that each was individually entitled to judgment for damages from the FDIC in individual amounts that aggregate to $731,354.80. The district court entered an order to that effect. App. D, 31a, 35a.

The FDIC then moved for an order that the judgment for damages against it could be satisfied by it by the tender of receiver's certificates payable out of the proceeds of the liquidation of the Bank of Newport's assets rather than in cash. The district court granted the motion. In its opinion, the district court concluded that petitioners' right to damages under § 1821(e) was no more than a low priority claim against the assets of the failed bank that were distributed pursuant to § 1821(d)(11), and that therefore the FDIC was not required to pay petitioners' damages claims in cash. App., 22a-26a.

Petitioners filed a timely appeal to the Ninth Circuit Court of Appeals. On November 2, 1999, that court affirmed the district court's judgment, concluding that the damages for which that Congress had made the FDIC liable to repudiated contract claimants such as petitioners under § 1821(e) were merely a subset of all claims of all claimants against the failed bank and were therefore to be paid solely

from the bank assets marshaled and distributed according to the priorities set out in § 1821(d), because Congress had limited the FDIC's liability as receiver to the assets of the insolvent institution pursuant to § 1821(i)(2). App. 10a-13a. The panel also held that because repudiation damages under §1821(e) are subject to the distribution priority of § 1821(d)(11)(A), California law requiring that all wages be paid in cash was preempted. App. 15a-16a.

Petitioners' request for reconsideration and suggestion for en banc review was denied and rejected on January 27, 2000. App. E.

REASONS FOR GRANTING THE WRIT

I.

WHEN CONGRESS GAVE REPUDIATED DAMAGES CLAIMANTS "DAMAGES" IT MEANT THAT THEY SHOULD BE COMPENSATED WITH CASH AND NOTHING LESS

In § 1821(d) Congress said that repudiated contract claimants were entitled to "actual direct compensatory damages" from the FDIC. Congress meant what it said. The Ninth Circuit thinks otherwise, holding that petitioners, as repudiated contract claimants, were not entitled to "actual direct compensatory damages" in the form of cash money paid by the FDIC, but instead had to accept effectively worthless receiver's certificates that could only be satisfied from the minimal assets of the liquidated Bank of Newport, petitioners' former employer.

In its decision, the Ninth Circuit reasoned that since Congress had established an elaborate claims process and a distribution priority in § 1821(d) for the bank's creditors, and since § 1821(i) limits the liability of the FDIC to the creditors' distributive share of the assets of the failed bank, petitioners' right to § 1821(e) damages was simply a subset of the claims described in § 1821(d) and their claims against the FDIC for damages were effectively the same as those of ordinary trade creditors and could be satisfied out of bank assets instead of with cash money.

The crux of the Ninth Circuit's opinion was its belief that Congress must have intended "damages" under § 1821(e) to be payable as if they were trade creditors' claims under § 1821(d) because Congress would not otherwise have failed to create a parallel process for claiming and proving "damages" equivalent to the elaborate scheme created in § 1821(d). That conclusion overlooks one hugely important fact.

A creditor's claim is a creature of statute and its processing and administration, like the processing and administration of claims against the assets of a debtor in bankruptcy, is a matter of statutory articulation. Damages, on the other hand, have been proved and calculated under the common law for centuries. Congress did not have to invent those rules and did not have to tell the FDIC or the courts what to do or how to do it because Congress, like everyone else, knew exactly what damages were and how to get them.

No court has ever found that FIRREA is a model of clarity. But the Ninth Circuit's decision here ignores the fact that Congress only allowed "actual direct compensatory damages" to claimants under subsection (e), "damages" are

"cash money", not anything less and they are intended to compensate for the full value of a claimant's loss. A receiver's certificate, on the other hand, is not the equivalent of cash and does not give full value, and the process by which ordinary trade creditors are given receiver's certificates was neither necessary for nor intended to apply to repudiated contract claimants to whom Congress had given the right to "damages".

Beyond the obvious fact that Congress placed damages for repudiated contract claimants in a separate and facially coequal subsection of § 1821, it used different terms to describe the claimants, gave each type of claimant different rights, set up different statutes of limitations for each class of claimant and provided different remedies for each. The Ninth Circuit's decision obliterates all of Congress' distinctions.

A. Congress Only Gave "Damages" to Repudiated Contract Claimants and Did Not Give "Damages" to "Creditors".

When Congress uses a word or a phrase courts must apply that language as Congress intended that it should be understood:

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Russello v. United States, 464 U.S. 16, 23 (1983) (citation omitted) (internal quotation marks omitted). Moreover, it is a

> fundamental canon of statutory construction that the words of s statute must be read in their context and with a view to their place in the overall statutory scheme.

Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989). Congress gave repudiated contract claimants, and only those claimants, the right to "actual direct compensatory damages" in subsection (e). Congress described claimants under subsection (d), but not repudiated contract claimants under subsection (d), as "creditors", in no other part of § 1821 gave "damages" to "creditors" and only limited the FDIC's liability to "creditors", not to "damages" claimants in § 1821(i).

Since Congress chose to give repudiated contract claimants and no one else "actual direct compensatory damages" in a separate subsection that choice must be given effect by giving the word and the phrase their intended meaning.

B. "Damages" Are Universally Understood to Be Money.

Curiously, considering the importance of damages in American jurisprudence, neither this Court nor the courts of appeals appear actually to have expressly held that compensatory damages are payable in money and not with something less, although many courts, including this Court, have come reasonably close. But from historic times, damages are and have been universally understood to be compensation in the form of cash money.

The preeminent legal dictionary fills over four pages with definitions of kinds of damages, all variants of its initial definition of the word as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." Black's Law Dictionary, 393-397 (7th ed. 1999). Popular lay dictionaries are the same; the ordinary definition of "damages" is "money ordered to be paid as compensation for injury or loss." AMERICAN HERITAGE COLLEGE DICTIONARY 3D, p. 350 (1993). And obviously, Congress knew that there existed an entire common law of many centuries' standing that provides for the payment of "damages" in money. *See, e.g.*, Belli, MODERN DAMAGES (1959) § 7, p. 21 and the lengthy disquisition that follows; RESTATEMENT OF CONTRACTS (SECOND), §§ 344-347, pp. 102-119 and authorities cited therein. Indeed, this definition is so universally accepted that when anyone, including this Court and certainly not excluding Congress, has spoken of damages it is cash money to which the reference has been made without any need for discussion.

For example, when this Court was called upon to interpret the extension of jurisdiction to the district courts to hear actions "seeking relief other than money damages", in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), not only did the majority hold that "damages" are a form, although not the only form, of payment of money, it used the terms "money damages", "damages" and "monetary relief" as synonymous and interchangeable and quoted with approval an opinion of the court of appeals that confidently asserted that damages are "a sum of money" given to a plaintiff as "compensatory relief" and as a substitute for a suffered loss, while the dissent expressly and succinctly found that the term "damages" encompassed the entire category known in the common law as monetary compensation for a loss. 487 U.S. at 892, 895; 487 U.S. at 913-915 (Scalia, J., dissenting).

In *Bowen*, the language of the statute coupled the word "money" to the word "damages" and the case is therefore distinguishable, nor was it necessary for this Court to consider in *Bowen* whether a person with a statutory right to damages had to be compensated with money, but it is obvious that this Court too believed that "damages" are "money".

Since Congress did not expressly define the term in the statute it must be interpreted as taking its "ordinary, contemporary common meaning". *See Perrin v. United States*, 444 U.S. 37, 42-43 (1979). The ordinary and common meaning of "damages" has invariably been money. Thus, when Congress used the word "damages" it must have understood and intended that "damages" should be paid in money.

C. Congress Intended That Repudiated Contract Claimants' "Damages" Compensate Them For The Full Value Of Their Loss.

The fact that "damages" must be paid in money is, however, not the end of the analysis. Congress did not grant mere "damages" to repudiated contract claimants like petitioners, it described those damages as "*actual direct compensatory* damages". Manifestly, Congress did not casually place three separate adjectives modifying "damages" into § 1821(d). By describing the damages that repudiated contract claimants had a right to get as "actual", "direct" and "compensatory" Congress emphasized that it expected that such claimants should be made whole.

"Actual" means "existing and not merely potential or possible." AMERICAN HERITAGE COLLEGE DICTIONARY 3D, *supra*, at 14. "Direct", as relevant here, means "having no

intervening persons, conditions, or agencies; immediate." AMERICAN HERITAGE COLLEGE DICTIONARY 3D, *supra*, at 392. And as just about every court that has considered the issue has understood and held, Congress meant full value when it said that damages awarded under § 1821(e) should "compensate".

Damages for the repudiation of the contractual right to severance payments under § 1821(e) (to which the Ninth Circuit has correctly held parties like petitioners here are entitled, *Monrad*, 62 F.3d at 1174) are "damages which can be thought to make one whole . . ." *Office and Professional Employees International Union, Local 2 v. FDIC*, 27 F.3d 598, 604 (D.C. Cir. 1994) ["*OPEIU*"]. A party is entitled to the "actual amount due" on the contract in order "precisely" to "compensate" for the loss; "[t]he damages are clearly compensatory; the loss caused by the injury is simply replaced.". *McMillan v. FDIC*, 81 F.3d 1041, 1055 (11th Cir. 1996). The purpose of § 1821(e) damages is "to put [the party entitled to them] where he would have been if the contract had been fulfilled." *Nashville Lodging Co. v. RTC*, 59 F.3d 236, 246 (D.C.Cir. 1995) (comparing to reliance damages).

And, of course, when the Ninth Circuit adopted the § 1821(e) of D. C. Circuit's interpretation in *OPEIU* it also expressly adopted that Circuit's conclusion that repudiated contract damages claimants were entitled to "damages which can be thought to make one whole". *Monrad*, 62 F.3d at 1174, quoting *OPEIU*, 27 F.3d at 604.

There can therefore be no question that Congress meant that payment of damages to repudiated contract creditors like petitioners should make them whole.

D. A Receiver's Certificate Is Not Money and Does Not Give Full Value or Make the Recipient Whole.

Since Congress intended that repudiated damages claimants be promptly compensated fully and made whole for the loss of their valuable contract rights, plainly only cash will replace or reimburse petitioners for the severance and separation pay that they did not collect or put them in as good a position as they would have been in had they received full performance of their contracts. On the other hand, if Congress had intended that repudiated contract claimants should be given certificates that merely allowed them to join the scramble for the scraps of the failed bank it would have said so and not used a word and a phrase so completely at odds with that concept. The Ninth Circuit's decision that the FDIC could satisfy petitioners' right to "damages" by the tender of receiver's certificates is simply wrong.

A receiver's certificate is simply an administrative document that gives its holder no more than the potential right to future proceeds from the meager assets of a bank that had to be seized and liquidated because it did not have enough assets or value to survive. In stark contrast to the value inherent in the award of "actual direct compensatory damages", a receiver's certificate is clearly not "money" but instead merely a piece of paper that might someday entitle the holder to a possible distribution; here the FDIC concedes that there will be nothing.

In short, if a receiver's certificate gives full value that is a fortunate and rare happenstance and hardly "actual" or "direct", and Congress could hardly have intended that a right to be compensated in full could be satisfied by the tender of a mere expectation and a generally hopeless one at that.

E. Congress Could Not Have Intended the Process by Which "Creditor Claims" Are Proven and Paid Be Applied to the Payment of "Damages".

The Ninth Circuit's decision is also inconsistent with Congress' statutory regime for the payment of claims under § 1821(d). Not only is a receiver's certificate, unlike money damages, only the culmination of a detailed administrative process established in § 1821(d) as the sole remedy for parties Congress described as "creditors" of the failed bank, that process is simply inapplicable and inappropriate to its use for "damages" claims.

First, while repudiated contract claimants are given "damages", everyone else is given "claims", and the determination of "claims" is only provided in subsection (d). App. 42a. If Congress had intended to let the FDIC determine damages as if they were claims it would have said so.

Second, as noted, parties who get "damages" are not described in any part of § 1821 as "creditors", but everyone else is and everyone else's claims are described as "creditor claims". If Congress had intended that repudiated contract claimants be included with everyone else it would have used the same terms for both.

Third, the explicit and detailed notice provisions in subsection (d) require notice promptly published and republished, mailed and remailed, to the bank's creditors. § 1821(d)(3)(A), (B) and (C), App. 42a-43a. Repudiated contract claimants have no claims against the bank but instead have a right to damages from the FDIC.

Fourth, the FDIC has the right to disallow creditors' claims if not proved to its satisfaction, and no judicial review of that determination is permitted. § 1821(d)(5), (6), (7), and (8), § 1821(d)(5)(E), App. 44a-47a. Not only does the FDIC have no right to "disallow" a claim for "actual direct compensatory damages", Congress clearly gave repudiated contract claimants the absolute right to payment of those damages and their right to sue for those damages, as petitioners have done, has never been challenged or questioned in the eleven years FIRREA has been on the books.

Fifth, Congress created and the FDIC promulgated a distribution priority for the amounts realized from the liquidation of the failed bank's assets, and there is no place in that priority for the payment of the FDIC's damages. App. 47a-48a.

Sixth, ordinary creditors must file their claims within a statutory window and with certain exceptions lose their right to collect if they fail to do so, and the FDIC has only 180 days after presentation to determine those claims. App. 42a-43a. The FDIC has a "reasonable" but statutorily unlimited time within which to act on repudiation. § 1821(e)(2).

And, seventh, while ordinary creditors are solely limited to recourse to the liquidated assets of the bank, the FDIC is liable to pay damages to the repudiated contract claimants. §§ 1821(e) and 1821(i), App. 47a-48a. (And see section II of this petition, *infra*.)

In short, ordinary trade creditors are given no more than the right to file a timely claim, the right to have the FDIC decide whether or not to approve that claim and the right to

participate as an approved claimant in the distribution of whatever assets remain of the failed bank. Indeed, it is a simple lexical fact that while one "distributes" the proceeds of liquidated assets ordinarily one does not "distribute" damages. To distribute is "to divide and dispense in portions". AMERICAN HERITAGE COLLEGE DICTIONARY 3D, *supra*, at 404. Nothing in the concept of "damages" is consistent with the concept of division of this limited *res*.

On the other hand, parties to the limited types of contracts described in § 1821(e) have one of two valuable rights, depending upon how the FDIC exercises its discretion. The FDIC may either assume or affirm such a contract, in which case the contracting party gets full performance of the contract and therefore its full value, or the FDIC may repudiate or disaffirm that contract, in which case the party to that repudiated contract is entitled to have "actual direct compensatory damages" from the FDIC.

The FDIC decided in the absence of any direction from Congress as to the mechanics of processing claims from repudiated contract claimants to do so in the same manner as it treats the § 1821(d) claims of ordinary creditors, and the courts have deferred to that practice in light of its evident practicality. *See, e.g., Heno v. FDIC*, 996 F.2d 429, 434 (1st Cir. 1993). But that fact neither justifies nor rationalizes the Ninth Circuit's decision to impose the monetary limits of § 1821(d) on the rights of claimants entitled to be made whole under § 1821(e).

Having made the FDIC, not the failed bank, liable for the payment of "damages" as contemplated in the common law it was unnecessary to make elaborate separate provision for their payment. The entire § 1821(d) distribution scheme

points to Congress' intent to restrict this elaborate process to the proof and satisfaction of ordinary creditors' claims against the bank, not the damages claims of claimants like petitioners. Congress must therefore have intended that "creditors" under § 1821(d) and parties to repudiated contracts under § 1821(e) be treated differently. If that distinction is to be honored, as it must be, the concept of "damages" must be accorded a different meaning than that of a mere right to participate in liquidated assets.

II.

THE NINTH CIRCUIT'S DECISION AUTHORIZES THE FDIC TO AVOID AN OBLIGATION THAT CONGRESS EXPRESSLY REQUIRED IT AND IT ALONE TO PAY.

If no court has felt it necessary heretofore to say directly that a right to damages means a right to money, no court appears ever to have found it necessary even to consider whether a government agency to which Congress has given an obligation could shift that obligation to someone else. Indeed, the idea that it is Congress and no one else who is entitled to decide what the Federal Government may do is so fundamental as to be almost subliminal and not susceptible to the usual research tools of the law. Nonetheless it falls on petitioners here to ask the Supreme Court of the United States to hold that when Congress makes an agency responsible for a monetary obligation that agency may not deflect its satisfaction of that obligation to an independent and separate source of recovery.

When it held that petitioners were required to stand in line with ordinary trade creditors to collect the actual direct compensatory damages that Congress gave them, the Ninth Circuit, without even acknowledging it, completely disregarded Congress' decision that those damages were a liability of the FDIC, as subsection 1821(e)(3)(A)(i) succinctly states. There is absolutely no reason why a liability for damages that Congress imposed on the FDIC may be paid from any other source.

The language of the statute is straightforward. "[T]he *liability of the conservator or receiver* for the disaffirmance or repudiation of any contract . . . shall be . . . limited to actual direct compensatory damages . . ." 12 U.S.C. § 1821(e)(3)(A)(i) (emphasis added). It is the FDIC, not the failed bank or its assets, that Congress made liable for damages.

An obligation that the FDIC incurs when it repudiates a contract is by no conceivable definition an obligation of anyone else. It is, instead, a direct claim against the FDIC that arises as a result of the exercise by the FDIC of its statutory discretion. Nowhere in § 1821(d) or § 1821(e) is the FDIC given the authority to pay claims against itself out of the proceeds collected for the bank's creditors under § 1821(d).

Nor does § 1821(i) provide such authority, as the Ninth Circuit erroneously believed. While subsection (i)(2) does contain the language on which that court relied, subsection (i)(1), not quoted, expressly provides that § 1821(i) governs the rights of the "creditors" *of the bank*, not claimants to whom the FDIC has been made liable. Since petitioners are not "creditors" of the bank but of the FDIC, that subsection is clearly not applicable to their rights. There is simply no statutory authorization to look to any other source of payment.

This conclusion, that the FDIC is liable for its own debts, is so obvious that no court has ever held anything different. Indeed, in dicta, the Tenth Circuit emphatically rejected the idea that a claim against the regulator may be treated as if it were a claim against the failed bank. *Homeland Stores, Inc. v. RTC*, 17 F.3d 1269, 1275 (10th Cir. 1994), *accord*, in principle, *RTC v. Midwest Federal Savings*, 4 F.3d 1490, 1496 (9th Cir. 1993).

Other courts, not excluding the Ninth Circuit, have merely assumed and stated the obvious. *See, e.g., Monrad v. FDIC*, 62 F.3d 1169, 1174 (9th Cir. 1995) ("*FDIC*'s liability . . . under 12 U.S.C. § 1821(e)") (emphasis added), *FDIC v. Craft*, 157 F.3d 697, 703 (9th Cir. 1998) 703 ("when *it* [the FDIC] repudiates, *it* is liable for 'actual direct compensatory damages' carefully and precisely set out in the statute [subsections 1821(e)(1) and (3)]") (emphasis added), *OPEIU*, 27 F.3d at 601 ("the issue before us is the extent of the *FDIC*'s liability for damages") (emphasis added), *First Bank National Association v. FDIC*, 79 F.3d 362, 366 (3rd Cir. 1996) (under § 1821(e)(4) the *FDIC* is obligated to pay certain costs as rent but "not subject to any *liability*" for other related costs) (emphasis added).

This is not a trivial matter. Giving a party to a repudiated contract to whom Congress gave a right to damages from the FDIC a certificate payable out of the bank's assets shifts the FDIC's liability to the very limited pool that Congress clearly intended was to be reserved for all of the "creditors" of the failed bank. This recourse would harm the ordinary creditors, the repudiated contract claimants and the very process by which a failed bank is to be resolved.

Ordinary creditors would be hurt by having to share the almost invariably inadequate pool of proceeds with another class of claimant. Instead of the damages that Congress meant to make them whole, repudiated contract claimants would receive nothing, since there is no provision in the distribution priority in § 1821(d)(11) and its related FDIC regulation for them to receive any portion of the distributed assets of the failed bank. And the FDIC would have to manage two conflicting sets of claimants, trade creditors whose claims were required to be proven and approved within a relatively short statutory period, § 1821(d)(5), and repudiated contract claimants whose right to damages would not arise until the lapse of the "reasonable period" not set according to any defined statutory period, § 1821(e)(2), within which the FDIC may exercise its right to repudiate those contracts.

In fact, the only way to find that petitioners must look to the liquidated assets of the bank along with the ordinary creditors is to engage in a wholesale rewriting of § 1821. They would have to be given a place in the § 1821(d)(11) hierarchy of distribution, the "reasonable period" within which the FDIC may repudiate a contract would have to be eliminated in favor of the short deadlines contained in § 1821(d), and a federal agency would have to be allowed, for the first time in the history of the Republic, to pay damages claims that Congress imposed against it with monies from another source entirely.

The foregoing is, of course, an absurdity. In enacting § 1821, Congress provided separate sources of payment for each class of claimant. Repudiated contract claimants were given the right to damages from the FDIC. Ordinary creditors were given the right to payment out of bank assets. Depositors were given a right to payment from deposit

insurance funds under § 1821(f). Petitioners are no more entitled to be paid from the liquidated assets belonging to the ordinary creditors than they are from the deposit insurance fund made available solely to depositors. Petitioners are entitled to be paid their damages by the FDIC from its own resources and the FDIC is required to make that payment.

III.

THE DECISION BELOW VIOLATES THIS COURT'S HOLDING THAT CALIFORNIA LAW IS NOT GENERALLY PREEMPTED BY FIRREA

California has deemed it appropriate to require the payment of every type of employee benefits and wages in full and in cash. The Ninth Circuit and most other circuits have already held that these benefits are compensable as actual damages under § 1821(e). *Monrad*, 62 F.3d at 1174, *OPEIU*, 27 F.3d at 603-604.

Under California law, all benefits to which an employee is entitled as part of his or her compensation are considered "wages". *Department of Industrial Relations v. UI Video Stores, Inc.*, 64 Cal. Rptr. 2d 457, 461 (1997). Under California law, wages, including these other benefits, must be paid in cash without discount. Cal. Lab. Code § 212(a), and *see Triad Data Services v. Jackson*, 200 Cal. Rptr. 418, 423 (App. Dept. Supr. Ct. 1984). Nonetheless, the Ninth Circuit decision holds that FIRREA preempts California law, essentially reverting to a position that was rejected by this Court only a few years ago in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-89 (1994).

The Ninth Circuit's specific conclusion that California law was preempted was based upon its erroneous assumption that claims for damages under § 1821(e) are subject to the distribution priority of § 1821(d)(11)(A). As discussed, the idea that Congress enacted separate rights for separate classes of claimants in two co-equal code sections with the intent to make one section a subset of the other is simply incorrect. Fundamentally, however, this conclusion appears no less based on an unarticulated belief that there is a federal interest in denying the petitioners the payment of wages, as defined in California law, in cash, as required by California law.

Under the common law of California the term "damages" has the same universally understood meaning as is found in all other jurisdictions. *AIU Insurance Co. v. Superior Court*, 799 P.2d 1253, 1267-1268 (Cal. Sup. Ct. 1990) ("Definitions of 'damages' share several basic concepts. Each requires that there be 'compensation,' 'money,' 'recovered' by a party for 'loss' or 'detriment' it has suffered through the acts of another"). There is no interpretation of § 1821(e) that would make those damages that represent Petitioners' severance pay any less "wages" as understood by California law. Both Congress' and California's intentions are the same.

Moreover, Congress placed no limitation on the "actual direct compensatory damages" to which a party was entitled after repudiation by the FDIC of his or her contract, save that those damages not be punitive, for lost profits or for pain and suffering, none of which remotely characterizes the damages here. There is therefore no conceivable conflict between California's position and Congress' intent in § 1821(e). Clearly, Congress cannot be said to have occupied the field or to have preempted the application of California law requiring the payment of petitioners' severance and separation benefits in cash under California law.

It is also beyond question that, as this Court has numerous times held, in the absence of any express language to the contrary in FIRREA the matter is left subject to the requirements of state law. *O'Melveny*, 512 U.S. at 88. Indeed, in *O'Melveny* this Court held to the contrary, finding that the FDIC as receiver "steps into the shoes" of the failed financial institution, "to work out its claims under state law." 512 U.S. at 86.

There is therefore no preemption of California's statutory policy or petitioners' right to be paid in cash.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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